LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
FEB 22 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 1376

SAMUEL GOLDWYN PRODUCTIONS, a Limited Partnership, and SAMUEL GOLDWYN,
Petitioners,

v.

JAMES A. MULVEY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMBROSE DOSKOW
MARTIN GANG
JOEL W. STERNMAN
ROSENMAN COLIN KAYE PETSCHEK
FREUND & EMIL
GANG, TYRE & BROWN

575 Madison Avenue
New York, New York 10022
Attorneys for Petitioners

INDEX

	PAGE
OPINION BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
I—The Decision Below Conflicts With A Decision of the Court of Appeals for the Second Circuit on the Proper Interpretation of 15 U. S. C. § 15, As Well As With Other Court of Appeals Decisions On the Same Issue	5
II—The Court Below Decided An Important Question Under the Antitrust Laws Which Has Not Been, But Should Be, Settled By This Court	10
CONCLUSION	13
APPENDIX	1a
Findings and Conclusions of District Court	1a
Judgment	8a
Opinion of Court of Appeals	10a
Order Denying Rehearing	16a

TABLE OF CASES

Billy Baxter, Inc. v. *Coca-Cola Co.*, 431 F. 2d 183 (2d Cir. 1970), *petition for cert. filed*, 39 U. S. L. W. 3239 (U. S. Nov. 20, 1970) (No. 989) 8, 9, 10, 11

PAGE

Fields Productions, Inc. v. *United Artists Corp.*, 432 F. 2d 1010 (2d Cir. 1970), *aff'g per curiam*, 318 F. Supp. 87 (S. D. N. Y. 1969), *petition for cert. filed*, 39 U. S. L. W. 3259 (U. S. Dec. 4, 1970) (No. 1062) 5, 6, 10

Fortner Enterprises v. *United States Steel Corp.*, 394 U. S. 495 (1969) 12

Harrison v. *Paramount Pictures, Inc.*, 115 F. Supp. 312 (E. D. Pa. 1953), *aff'd*, 211 F. 2d 405 (3d Cir.), *cert. denied*, 348 U. S. 828 (1954) 10

Hoopes v. *Union Oil Co.*, 374 F. 2d 480 (9th Cir. 1967) 8, 10

International Salt Co. v. *United States*, 332 U. S. 392 (1947) 12

Karseal Corp. v. *Richfield Oil Corp.*, 221 F. 2d 358 (9th Cir. 1955) 8

Mandeville Island Farms, Inc. v. *American Crystal Sugar Co.*, 334 U. S. 219 (1948) 11

Melrose Realty Co. v. *Loew's, Inc.*, 234 F. 2d 518 (3d Cir.), *cert. denied*, 352 U. S. 890 (1956) 10

Nationwide Auto Appraiser Service, Inc. v. *Association of Casualty & Surety Cos.*, 382 F. 2d 925 (10th Cir. 1967) 10

Northern Pacific Ry. Co. v. *United States*, 356 U. S. 1 (1958) 12

Productive Inventions, Inc. v. *Trico Products Corp.*, 224 F. 2d 678 (2d Cir. 1955), *cert. denied*, 350 U. S. 936 (1956) 8

Radiant Burners, Inc. v. *Peoples Gas Light & Coke Co.*, 364 U. S. 656 (1961) 11

Radovich v. *National Football League*, 352 U. S. 445 (1957) 11

PAGE

Salerno v. *American League of Professional Baseball Clubs*, 429 F. 2d 1003 (2d Cir. 1970), *cert. denied*, 39 U. S. L. W. 3298 (U. S. Jan. 11, 1971) (No. 832) 12

SCM Corp. v. *Radio Corp. of America*, 407 F. 2d 166 (2d Cir.), *aff'g*, 276 F. Supp. 373 (S. D. N. Y. 1967), *cert. denied*, 395 U. S. 943 (1969) 8, 13

Snow Crest Beverages, Inc. v. *Recipe Foods, Inc.*, 147 F. Supp. 907 (D. Mass. 1956) 11

South Carolina Council of Milk Producers, Inc. v. *Newton*, 360 F. 2d 414 (4th Cir.), *cert. denied*, 385 U. S. 934 (1966) 10

Twentieth Century Fox Film Corp. v. *Goldwyn*, 328 F. 2d 190 (9th Cir.), *cert. denied*, 379 U. S. 880 (1964) 8

Volasco Products Co. v. *Lloyd A. Fry Roofing Co.*, 308 F. 2d 383 (6th Cir. 1962), *cert. denied*, 372 U. S. 907 (1963) 10

STATUTES

Clayton Act § 4, 15 U. S. C. § 15 2

28 U. S. C. § 1254(1) 2

MISCELLANEOUS

Pollock, *The "Injury" and "Causation" Elements of A Private Antitrust Action*, 21 A. B. A. ANTITRUST SECTION 341 (1962) 11

E. TIMBERLAKE, FEDERAL TREBLE DAMAGE ANTITRUST ACTIONS (1965) 11

IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No.

SAMUEL GOLDWYN PRODUCTIONS, a Limited Partnership, and SAMUEL GOLDWYN,

Petitioners,

v.

JAMES A. MULVEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Samuel Goldwyn Productions, a limited partnership, and Samuel Goldwyn (hereinafter collectively referred to as "Goldwyn") pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on October 20, 1970 and modified on December 1, 1970, which reversed a summary judgment in favor of Goldwyn granted by the District Court for the Central District of California.

OPINION BELOW

The opinion of the Court of Appeals is reported at 433 F. 2d 1073; it is printed in the appendix hereto (pp. 10a, 16a). No opinion was rendered by the District Court; that Court entered findings of fact and conclusions of law which also appear in the appendix (p. 1a).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was rendered on October 20, 1970. A timely petition for rehearing with a suggestion for a rehearing en banc was denied on December 1, 1970 by an order modifying the Court's opinion. This petition for certiorari is filed within 90 days of the latter date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED

Whether a person entitled to share in receipts from distribution of a product has been injured "by reason of" antitrust violations and has standing to sue under Section 4 of the Clayton Act where the distributor has violated the antitrust laws in distributing the product to his customers.

STATUTORY PROVISION INVOLVED

Section 4 of the Clayton Act, 15 U. S. C. § 15:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States * * * without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

The opinion of the Court of Appeals concisely states the relevant facts:

> "The following facts are undisputed. On December 28, 1948, Mulvey, the sole owner of the motion picture 'Pride of the Yankees' (hereinafter 'Pride'), sold his entire interest to Samuel Goldwyn Productions, Inc., for $1,500,000. By the terms of their agreement, the Goldwyn corporation was to pay Mulvey $100,000 down and the balance in semi-annual payments equal to 82½ percent of the net receipts generated by the film's distribution. However, if the percentage Mulvey was entitled to receive should not aggregate $1,500,000 by September 30, 1973, the parties agreed to reduce the purchase price to the total sum of the receipts then due to Mulvey.
>
> "On September 8, 1951, Mulvey transferred his undivided 10 percent interest in four other motion pictures to the Goldwyn corporation for $400,000. The agreement provides the same plan of payment as for 'Pride,' except that the down payment was $51,248 and the payment period extends to July 1, 1976.
>
> "The Goldwyn corporation was thereafter dissolved, and its interest in the five films and its contractual obligation to Mulvey were acquired by Samuel Goldwyn Productions, a limited partnership, in which Samuel Goldwyn was the sole general partner. Goldwyn packaged the films with forty-five other films he owned, and he licensed the bundle ('Samuel Goldwyn Library of Films for

Television') for television exhibition beginning about 1960.

"For purposes of this appeal, Goldwyn concedes that he block booked the library and that that block booking was a violation of section 1 of the Sherman Act. (*See, e.g.,* United States v. Loew's, Inc. (1962) 371 U. S. 38, 44-52; United States v. Paramount Pictures, Inc. (1948) 334 U. S. 131, 156-59).

Mulvey contends that Goldwyn's block booking was a cause of his receiving only $740,800.95 on his contracts, instead of a price more nearly approximating the $1,900,000 contractual maximum" (433 F. 2d at 1074-75; App. at 11a-12a).

On these facts, the District Court (Stephens, J.) granted a motion by Goldwyn for summary judgment dismissing Mulvey's claim. In holding that Mulvey lacked standing to sue, the Court concluded that:

"Plaintiff is not, and at all times herein relevant was not, within those areas of the economy which are or were endangered by a breakdown of competitive conditions, to wit, the business of licensing pictures for television exhibition either as supplier of pictures to television stations or as a customer in the market for pictures to be exhibited over television stations" (App. at 5a-6a).

The judgment was reversed by the Court of Appeals, which held that Mulvey has standing to claim injury under the antitrust laws by reason of the admittedly illegal block booking. On reargument, the opinion of the Court of Appeals was modified solely by adding a footnote reading:

"We disagree with the contrary conclusion on the standing issue reached by the Second Circuit, per

curiam, in Fields Productions, Inc. v. United Artists Corp. (1970) [432] F. 2d [1010]" (433 F. 2d at 1076; App. at 16a).

REASONS FOR GRANTING THE WRIT

I

The Decision Below Conflicts With A Decision of the Court of Appeals for the Second Circuit on the Proper Interpretation of 15 U. S. C. § 15, As Well As With Other Court of Appeals Decisions On the Same Issue.

In *Fields Productions, Inc.* v. *United Artists Corp.*, 432 F. 2d 1010 (2d Cir. 1970), *aff'g per curiam,* 318 F. Supp. 87 (S. D. N. Y. 1969), *petition for cert. filed,* 39 U. S. L. W. 3259 (U. S. Dec. 4, 1970) (No. 1062), it was held on motion for judgment on the pleadings that the owner of a percentage interest in the proceeds of the distribution of a motion picture has no standing to maintain an action for treble damages against the distributor who block booked that motion picture with others.

As the court below recognized, that decision of the Second Circuit directly conflicts with its decision in this case. In both cases, it was assumed for the purpose of defendant's motion that there had been block booking of plaintiff's pictures with others. In each case, the defendant contended that if plaintiff received less than he was entitled to from the profits of the picture, that injury resulted from a totally independent cause—the improper allocation of the proceeds among the various films in the block, but not "by reason of" the antitrust violation.

In this case, the Court of Appeals, in upholding plaintiff's standing, declared that Mulvey was "hit" by the antitrust violation because "He was within the area 'which it

could be reasonably foreseen would be affected' by block booking." It wrote:

> "Block booking enables a distributor to obtain greater revenue from less desirable films by forcing an exhibitor who desires other films to take the entire package. An exhibitor who refuses to accept the less desirable films will be denied the films of greater worth. Block booking thereby enhances the market value of those films of lesser intrinsic merit. If exhibitors refuse to accept the entire package, the revenue normally generated by the more desirable films will be substantially reduced.
>
> "Goldwyn directed his activities at the means of distributing films in order to affect their individual revenue-producing potentials—the target area. Mulvey's films are within this target area. Consequently, it is entirely foreseeable that Goldwyn's block booking could impair the profit potential of Mulvey's films, thus depreciating the value of Mulvey's contractual interest in the films' revenue" (433 F. 2d at 1076; App. at 15a).

In the *Fields* case, defendant had financed and distributed a motion picture produced by plaintiff under an agreement providing that defendant would not block book the picture. Plaintiff claimed that the block booking violated both the distribution agreement and the decree in a government antitrust case. In dismissing the complaint, the District Court (McLean, J.) wrote (318 F. Supp. at 88):

> "Block booking is a form of tying agreement. The reason that a tying agreement violates Section 1 is that it injures buyers and competitors of the seller. As applied to licensing motion pictures, this

means that the block booking injures the television stations who are compelled to accept motion pictures that they do not want and it also injures other distributors who are deprived of an opportunity to license their pictures to television stations who have been forced to accept defendant's pictures. United States v. Loew's Incorporated, 371 U. S. at 45. It is thus the television stations and the other distributors who are in the 'target area.' If the block booking in fact causes any injury to the producer of the pictures which are thus block booked, that injury is only incidental.

"Moreover, in this case it is difficult to see how the block booking could have caused injury to plaintiff, incidental or not. Plaintiff's grievance seems to be that it was not allocated a fair share of the total receipts from the block. The cause of plaintiff's damage, therefore, was the improper allocation, not the block booking. This may be a breach of contract, but it is not a violation of the antitrust laws. Plaintiff is already suing defendant for breach of contract, initially in this court and now in the state court. That would seem to be plaintiff's proper remedy. I can see no justification for trebling any damages to which plaintiff may be entitled."

Each of these conflicting decisions has antecedents in its circuit from which the conflict could have been foretold. While the courts in both circuits profess to apply the "target area" test to determine standing, they have given that test very different meanings. The Ninth Circuit rule equates the "target area" with that in which it reasonably could be foreseen that plaintiff would be affected by the violation, without any limitation based on the purpose of the particular

antitrust prohibition which defendant violated. In the Second Circuit, recovery is limited to those who have suffered the type of economic injury which the statute was designed to prevent.

In *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F. 2d 358 (9th Cir. 1955), a manufacturer of automobile wax which sold its product through franchised independent distributors was held to be within the "target area" of the defendant's illegal exclusive dealing contracts with independent service station operators. In *Twentieth Century Fox Film Corp.* v. *Goldwyn,* 328 F. 2d 190, 220 (9th Cir.), *cert. denied,* 379 U. S. 880 (1964), and *Hoopes* v. *Union Oil Co.*, 374 F. 2d 480, 485 (9th Cir. 1967), the *Karseal* case was cited in support of a definition of the "target area" as " 'the area which it could reasonably be foreseen would be affected' by the antitrust violation."

The conflicting approach of the Second Circuit is reflected in decisions denying the standing of a patent licensor entitled to royalties to sue under the antitrust laws for diminished royalties by reason of practices resulting in the loss of business by its licensee, *Productive Inventions, Inc.* v. *Trico Products Corp.*, 224 F. 2d 678 (2d Cir. 1955), *cert. denied,* 350 U. S. 936 (1956), recently followed in *SCM Corp.* v. *Radio Corp. of America,* 407 F. 2d 166 (2d Cir.), *cert. denied,* 395 U. S. 943 (1969). Most recently, in *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F. 2d 183 (2d Cir. 1970), *petition for cert. filed,* 39 U. S. L. W. 3239 (U. S. Nov. 20, 1970) (No. 989), a franchisor who licensed its trademark for use in the sale of soft drinks was held to be without standing to sue for an alleged loss of its royalties resulting from violations directed by defendant at the retail sale of soft drinks by plaintiff's franchisees. In affirming summary judgment for the defendant, the court wrote (at 187):

> "The statutory requirement that treble damage suits be based on injuries which occur 'by reason of' antitrust violations expressly restricts the right to sue under this section. There must be a causal connection between an antitrust violation and an injury sufficient for the trier of fact to establish that the violation was a 'material cause' of or a 'substantial factor' in the occurrence of damage. * * * And this connection must also link a specific form of illegal act to a plaintiff engaged in the sort of legitimate activities which the prohibition of this type of violation was clearly intended to protect. While any antitrust violation disrupts the competitive economy to some extent and creates entirely foreseeable ripples of injury which may be shown to reach individual employees, stockholders, or consumers, it has long been held that not all of these have the requisite standing to sue for treble damages and thereby take a leading role in the enforcement of the prohibition in question."

In *Billy Baxter,* moreover, the court expressly rejected the approach taken by the court below in this case, that standing was created by the fact that "Mulvey's films are within this target area." It wrote (at 188):

> "The appellant's claim to standing is not strengthened by the argument that the 'target' was the line of Billy Baxter products rather than a specific 'area' of economic activity in which the bottlers were engaged. Reference to the products as a target simply points to the self-evident fact that antitrust violations might do some damage to all the entities connected with their production and distribution. It is still necessary to examine a given plaintiff's role in these processes to determine whether it has the requisite relationship to the type of wrong alleged."

The square conflict between the decision below and that in *Fields* thus reflects a basic difference between the two circuits having roots in earlier decisions in each court. Furthermore, decisions in three other circuits are in accord with those of the Second Circuit and irreconcilable with the test applied by the court below in this case. *See Nationwide Auto Appraiser Service, Inc.* v. *Association of Casualty & Surety Cos.*, 382 F. 2d 925 (10th Cir. 1967); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F. 2d 383 (6th Cir. 1962), *cert. denied*, 372 U. S. 907 (1963); *Harrison* v. *Paramount Pictures, Inc.*, 115 F. Supp. 312 (E. D. Pa. 1953), *aff'd*, 211 F. 2d 405 (3d Cir.), *cert. denied*, 348 U. S. 828 (1954); *Melrose Realty Co.* v. *Loew's, Inc.*, 234 F. 2d 518 (3d Cir.), *cert. denied*, 352 U. S. 890 (1956).

II

The Court Below Decided An Important Question Under the Antitrust Laws Which Has Not Been, But Should Be, Settled By This Court.

The conflict of decisions cited above relates to an issue of obvious importance. It is an issue on which there is a large volume of reported cases but no decision of this Court.

Where courts have purported to find authority in opinions of this Court for the position taken below, they have been able to cite only general statements as to the role of the private action in the enforcement of the antitrust laws. *See, e.g., Hoopes* v. *Union Oil Co., supra*, 374 F. 2d at 485; *South Carolina Council of Milk Producers, Inc.* v. *Newton*, 360 F. 2d 414, 418-19 (4th Cir.), *cert. denied*, 385 U. S. 934 (1966); *Billy Baxter, Inc.* v. *Coca-Cola Co., supra*, 431 F. 2d at 197 (Waterman, J., dissenting). The opinions of this Court cited in those cases were all delivered in cases which did not involve the present issue, such as

Mandeville Island Farms, Inc. v. *American Crystal Sugar Co.*, 334 U. S. 219 (1948); *Radovich* v. *National Football League*, 352 U. S. 445 (1957); and *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U. S. 656 (1961). In each of those cases, the plaintiff was indisputably within the area of the economy which the pertinent antitrust provision was designed to protect; by any standard, the injury was "direct" and not "incidental". In none of them was the question of plaintiff's standing presented.

The court below expressly recognized that the issue it decided has not heretofore been resolved by this Court. It admitted that this Court "has not expressly overturned the decisions of the Courts of Appeals restricting the right to maintain a section 4 Clayton Act suit to those persons who are 'within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry.'" It held, erroneously we submit, that the restriction need not be considered because Mulvey's alleged injury, being reasonably foreseeable, came within the target area.

The open issue is a frequently recurring one. *Cf.* Pollock, *The "Injury" and "Causation" Elements of a Private Antitrust Action*, 21 A. B. A. ANTITRUST SECTION 341, 343 (1962); E. TIMBERLAKE, FEDERAL TREBLE DAMAGE ANTITRUST ACTIONS, § 4.03 (1965). As noted by the court in *Billy Baxter, Inc.* v. *Coca-Cola Co., supra*, any antitrust violation "creates entirely foreseeable ripples of injury which may be shown to reach individual employees, stockholders, or consumers" (431 F. 2d at 187), who have long been held not to have the requisite standing to sue for treble damages. If the decision below is allowed to stand, the cases can certainly be expected to multiply, with all who may foreseeably be touched by the "ripples" seeking the windfall of treble damages. *See Snow Crest*

Beverages, Inc. v. *Recipe Foods, Inc.*, 147 F. Supp. 907, 909 (D. Mass. 1956).

Moreover, the present decision goes further than those in which standing to sue was found because of a loss sustained by the plaintiff *derivatively* through a wronged party who clearly was within the target area. Tying agreements are held illegal because they cause restraint of competition for the tied product. *International Salt Co.* v. *United States*, 332 U. S. 392 (1947); *Northern Pacific Ry. Co.* v. *United States*, 356 U. S. 1 (1958); *Fortner Enterprises* v. *United States Steel Corp.*, 394 U. S. 495 (1969). The area of the economy which is protected against the tying practice of block booking is the market for the licensing of television films in which distributors are the sellers and television stations are the buyers. Mulvey is neither such a seller nor a buyer, and his alleged injury does not flow from the injury to the protected area of the economy. His grievance, it is plain, is that Goldwyn did not allocate to his pictures a sufficient share of the receipts from the entire block of films and therefore did not pay him the percentage to which he is entitled. If that claim has any merit, it is one for breach of contract.

The decision below allows Mulvey's contract claim to be converted into a treble damage antitrust claim in total disregard of the fact that the alleged damage is not caused by the acts constituting the antitrust violation and is unrelated to the injury which the prohibition of tying contracts is designed to prevent. Directly pertinent is the statement of Judge Friendly that:

> "Wrongful discharge of an employee does not become an antitrust violation simply because the employer is a monopolist; the private right of action is conferred only for an injury 'by reason of anything forbidden in the antitrust laws'." *Salerno* v. *American League of Professional Baseball Clubs*, 429 F. 2d 1003, 1005

(2d Cir. 1970), *cert. denied,* 39 U. S. L. W. 3298 (U. S. Jan. 11, 1971) (No. 832).

See also SCM Corp. v. *Radio Corp. of America,* 276 F. Supp. 373, 378 (S. D. N. Y. 1967), *aff'd,* 407 F. 2d 166 (2d Cir.), *cert. denied,* 395 U. S. 943 (1969), where a claim was characterized by Judge McLean as "a skillful attempt to turn a patent suit into an antitrust action, an attempt which does not come off."

The vast expansion of possible treble damage liability which the decision below portends makes it particularly appropriate that this Court resolve the conflict between that decision and those of the Second and other Circuits and establish a uniform national rule governing this recurring problem in the administration of the antitrust laws.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

AMBROSE DOSKOW
MARTIN GANG
JOEL W. STERNMAN
ROSENMAN COLIN KAYE PETSCHEK FREUND & EMIL
GANG, TYRE & BROWN
Attorneys for Petitioners

Appendix

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NO. 67-1634-S

JAMES A. MULVEY,

Plaintiff,

vs.

SAMUEL GOLDWYN PRODUCTIONS, a limited partnership, and SAMUEL GOLDWYN,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON SUMMARY JUDGMENT ON FIRST CLAIM FOR RELIEF ALLEGED IN PLAINTIFF'S COMPLAINT

This cause came on to be heard on October 28, 1968 on the motion of defendants, Samuel Goldwyn Productions, a limited partnership (herein "Partnership"), and Samuel Goldwyn (herein "Goldwyn"), for an order dismissing the First Claim for relief set forth in plaintiff's complaint, or, in the alternative, for an order for summary judgment for defendants and against plaintiff with respect to said First Claim, before the above-entitled Court, the Honorable Albert Lee Stephens, Jr., Judge Presiding, Gang, Tyre & Brown by Martin Gang appearing as counsel for defendants and Joseph L. Alioto, Maxwell M. Blecher, Stephen J. Schwartz and Peter J. Donnici by Maxwell M. Blecher appearing as counsel for plaintiff; and the Court, having

considered the complaint and the affidavits submitted in support of said motion and in opposition thereto, and having heard the evidence and arguments of counsel, and being fully advised, and the Court deeming said motion of defendants to be a motion for summary judgment pursuant to Federal Rules of Civil Procedure, Rule 12 (b), makes the following Findings of Fact and Conclusions of Law with respect to the First Claim alleged in the complaint.

FINDINGS OF FACT

I

The First Claim stated in the complaint herein arises under the anti-trust laws of the United States, to wit, section 1 of the Sherman Act (15 U. S. C. 1), and is a case of which this Court has jurisdiction under and by virtue of the provisions of 28 U. S. C. A. section 1337.

II

Defendant Partnership is a limited partnership, of which Goldwyn is the sole general partner.

III

The theatrical motion picture "Pride of the Yankees" (herein "Pride") was, prior to July 15, 1947, owned by Goldwyn.

IV

Goldwyn and plaintiff entered into an agreement dated July 19, 1944 (herein "1944 Agreement," Exhibit 11 to the Slaff Affidavit), pursuant to which Goldwyn, as seller, agreed to sell to plaintiff, as buyer, all of Goldwyn's right, title and interest in Pride, to become effective on July 15, 1947.

Findings and Conclusions of District Court

V

Pursuant to the 1944 Agreement, Goldwyn executed an assignment of his right, title and interest in Pride to plaintiff, dated July 15, 1947.

VI

By a written agreement dated December 28, 1948 (herein "1948 Agreement," Exhibit 13 to the Slaff Affidavit), plaintiff sold his right, title and interest in Pride to a California corporation named Samuel Goldwyn Productions, Inc. (herein "SGPI") for a purchase price of $1,500,000, of which $100,000 was paid on execution and the balance was to be paid, beginning November 30, 1949, by paying plaintiff a sum equal to 82½% of the net receipts (as defined in the 1948 Agreement) from the distribution and exploitation of Pride, with the proviso that if, by September 30, 1973, the total sums which plaintiff was entitled to receive pursuant to said agreement did not aggregate $1,500,000, the purchase price was to be reduced to the total of the sums which plaintiff would be entitled to receive to said date.

VII

On December 28, 1948, plaintiff was the owner of an undivided 10% interest in 4 motion pictures other than Pride, to wit, "Up in Arms," "The Princess and the Pirate," "Wonderman" and "The Kid From Brooklyn" (herein the "4 pictures").

VIII

By agreement dated September 18, 1951 (herein "1951 Agreement," Exhibit 14 to the Slaff Affidavit), plaintiff sold SGPI his right, title and interest in and to the un-

divided interests which plaintiff owned in said 4 pictures, and SGPI agreed to pay therefor for the sum of $400,000, of which $51,248.00 was to be paid in four installments, as therein specified, and the balance was to be paid as follows: commencing November 1, 1954, a sum equal to 82½% of the net receipts as defined in the 1948 Agreement from the "undivided interests" in the 4 pictures received by SGPI up to and including September 30, 1954, and semi-annually thereafter a sum equal to 82½% of said net receipts from the "undivided interests" in the 4 pictures, until the sum of $400,000 (including the four installments totalling $51,248.00) had been paid, with the proviso that if, by July 1, 1976, the total sums which plaintiff was entitled to receive pursuant to said agreement did not aggregate $400,000, the purchase price was to be reduced to the total of the sums which plaintiff would be entitled to receive to said date.

IX

SGPI was liquidated and dissolved, and its assets, including Pride and the 4 pictures, were distributed to the successor entity, the Partnership, which assumed all the obligations and liabilities of SGPI under the 1948 Agreement and the 1951 Agreement.

X

Beginning about 1960, the Partnership engaged in the business of licensing motion pictures for exhibition by means of television and among the pictures so licensed by the Partnership was Pride, which plaintiff had sold to SGPI under the 1948 Agreement, and the 4 pictures which plaintiff had sold to SGPI under the 1951 Agreement. Such business activity constituted a substantial amount of interstate commerce within the meaning of the anti-trust laws.

Findings and Conclusions of District Court

XI

By virtue of the liquidation and dissolution of SGPI, the Partnership became, and at all times herein relevant was, the owner of Pride and the other 4 pictures, subject to the obligations assumed by the Partnership to account to plaintiff pursuant to the terms of the 1948 Agreement and the 1951 Agreement.

XII

For the sole purpose of ruling on defendants' motion for summary judgment on plaintiff's First Claim, and for such purpose only, the Court has assumed the truth of the allegations set forth in paragraphs 9 through 11 of plaintiff's complaint.

XIII

The motion for summary judgment is a motion for judgment upon multiple claims as that term is used in Federal Rules of Civil Procedure, Rule 54(b), in that it is directed to Count One of a two-count complaint. There is no just reason for delay in entering final judgment on Count One because it is separate and independent of Count Two. The parties concede that the two counts do not in any way interrelate.

CONCLUSIONS OF LAW

XIV

Plaintiff is not, and at all times herein relevant was not, within those areas of the economy which are or were endangered by a breakdown of competitive conditions, to wit, the business of licensing pictures for television exhibition either as supplier of pictures to television stations or as a customer in the market for pictures to be exhibited over

television stations. The acts of the Partnership in licensing the pictures for television or exhibition were directed and "aimed" at the television stations which were the customers and potential customers of the Partnership.

XV

Plaintiff was not injured in his business or property by reason of anything forbidden in the anti-trust laws or by reason of any violation thereof by defendants.

XVI

The injury, if any, suffered by plaintiff in his business or property was not proximately caused by the Partnership or by the manner in which the Partnership licensed pictures for television exhibition.

XVII

Plaintiff is without standing to sue under the anti-trust laws.

XVIII

The injury, if any, to plaintiff by reason of the manner in which the Partnership licensed pictures for television exhibition was remote and indirect.

XIX

Plaintiff has suffered no damage or injury which is cognizable under the anti-trust laws.

XX

Defendants are entitled to summary judgment, ordering that the First Claim for relief set forth in plaintiff's complaint be dismissed on the merits, on the ground there is no

genuine issue as to any material fact and that defendants Partnership and Goldwyn are entitled to judgment as a matter of law, and that said defendants recover their costs and disbursements.

If any of the above numbered Findings of Fact shall be deemed to constitute a Conclusion of Law, it shall be considered as a Conclusion of Law and, conversely, if any of the above numbered Conclusions of Law shall be deemed to constitute a Finding of Fact, it shall be considered as a Finding of Fact.

XXI

A final judgment should be entered as to Count One and the Clerk should be directed to enter the Judgment. F. R. Civ. P., Rule 54(b).

Dated: February 25, 1969.

ALBERT LEE STEPHENS, JR.
Albert Lee Stephens, Jr.
United States District Judge

Judgment

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. 67-1634-S

JAMES A. MULVEY,

Plaintiff,

vs.

SAMUEL GOLDWYN PRODUCTIONS, a limited partnership, and SAMUEL GOLDWYN,

Defendants.

JUDGMENT

This cause came on to be heard on October 28, 1968 on defendants' motion for an order dismissing the First Claim for relief set forth in plaintiff's complaint, or, in the alternative, for summary judgment in favor of defendants and against plaintiff on the ground that there is no genuine issue as to any material fact and that the moving parties are entitled to a judgment as a matter of law, before the above-entitled Court, the Honorable Albert Lee Stephens, Jr., Judge Presiding, Gang, Tyre & Brown by Martin Gang appearing as counsel for defendants and Joseph L. Alioto, Maxwell M. Blecher, Stephen J. Schwartz and Peter J. Donnici by Maxwell M. Blecher appearing as counsel for plaintiff. The Court, having considered the complaint and the affidavits submitted in support of said motion and in opposition thereto, and having heard the evidence and arguments of counsel, and being fully advised, and the Court

deeming said motion of defendants to be a motion for summary judgment pursuant to Federal Rules of Civil Procedure, Rule 12(b), and the Court having made its Findings of Fact and Conclusions of Law and in accordance with said Findings of Fact and Conclusions of Law, it is hereby

ORDERED, ADJUDGED AND DECREED that the First Claim for relief set forth in plaintiff's complaint be dismissed on the merits, on the ground that there is no genuine issue as to any material fact and that the defendants, Samuel Goldwyn Productions, a limited partnership, and Samuel Goldwyn, are entitled to judgment as a matter of law, and that said defendants recover their costs and disbursements.

The Clerk is ordered to enter the judgment.

DATED: February 25, 1969.

ALBERT LEE STEPHENS, JR.
Albert Lee Stephens, Jr.
United States District Judge

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

October 20, 1970.

No. 24157.

JAMES A. MULVEY, *Appellant,*

v.

SAMUEL GOLDWYN PRODUCTIONS ET AL., *Appellees.*

Opinion of Court of Appeals

Before BARNES and HUFSTEDLER, Circuit Judges, and PECKHAM,* District Judge.

HUFSTEDLER, Circuit Judge:

Appellant James A. Mulvey appeals from a judgment dismissing from his complaint his first claim for relief brought under section 4 of the Clayton Act, U. S. C. § 15, charging appellees with violations of sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1, 2, thereby causing a diminution of the value of his contractual rights in five motion picture films. Judgment was entered after Goldwyn successfully moved for summary judgment on that claim.[1]

*Hon. Robert F. Peckham, United States District Judge for the Northern District of California, sitting by designation.

1. The remaining counts of Mulvey's complaint are separate from and independent of the first; no issue on appeal is raised in respect of those counts.

The following facts are undisputed. On December 28, 1948, Mulvey, the sole owner of the motion picture "Pride of the Yankees" (hereinafter "Pride"), sold his entire interest to Samuel Goldwyn Productions, Inc., for $1,500,000. By the terms of their agreement, the Goldwyn corporation was to pay Mulvey $100,000 down and the balance in semi-annual payments equal to 82½ percent of the net receipts generated by the film's distribution. However, if the percentage Mulvey was entitled to receive should not aggregate $1,500,000 by September 30, 1973, the parties agreed to reduce the purchase price to the total sum of the receipts then due to Mulvey.

On September 8, 1951, Mulvey transferred his undivided 10 percent interest in four other motion pictures to the Goldwyn corporation for $400,000. The agreement provides the same plan of payment as for "Pride," except that the down payment was $51,248 and the payment period extends to July 1, 1976.

The Goldwyn corporation was thereafter dissolved, and its interest in the five films and its contractual obligations to Mulvey were acquired by Samuel Goldwyn Productions, a limited partnership in which Samuel Goldwyn was the sole general partner. Goldwyn packaged the films with forty-five other films he owned, and he licensed the bundle ("Samuel Goldwyn Library of Films for Television") for television exhibition beginning about 1960.

For purposes of this appeal, Goldwyn concedes that he block booked the library and that that block booking was a violation of section 1 of the Sherman Act. (*See, e. g.*, United States v. Loew's Inc. (1962) 371 U. S. 38, 44-52; United States v. Paramount Pictures, Inc. (1948) 334 U. S. 131, 156-159.)

Mulvey contends that Goldwyn's block booking was a cause of his receiving only $740,800.95 on his contracts, instead of a price more nearly approximating the $1,900,000 contractual maximum.

Two issues are dispositive of this appeal: Did the district court err in holding as a matter of law that (1) there was no causal connection between the alleged diminution of the value of Mulvey's contractual rights in the five films and Goldwyn's block booking of those films, and (2) Mulvey has no standing to invoke section 4 of the Clayton Act, because he was not in the "target area" of the economy affected by the block booking? We answer both questions affirmatively.

Goldwyn's causation argument is two-pronged: First, he says that he was not under any contractual obligation to produce any income from the films; therefore, he cannot be liable for his failure to produce more money from the distribution of the films than he actually did, and therefore Mulvey cannot be said to have suffered injury from the method Goldwyn used to distribute the films. Second, he says that if he were under contractual duty to distribute and to maximize the net receipts from the photoplays, the breach of the contracts was the "controlling" cause of Mulvey's claimed injury and, therefore, the block booking was not the legal cause of his injury.

The arguments are specious. We assume, *arguendo,* that Goldwyn would not have been liable to Mulvey on any theory had he kept the five photoplays in his vault. But that is not what he did. He distributed them, using a method that violated section 1 of the Sherman Act. It is immaterial that block booking was or was not a breach of contract. Successful maintenance of an antitrust suit does not depend upon the availability or nonavailability of a

common-law remedy for that wrong. The antitrust laws are an expression of federal public policy to foster free competition. The treble-damage action was designed to implement that policy by encouraging private suitors to enforce the antitrust laws and thereby to deter potential violators from undertaking the forbidden conduct. That purpose would be frustrated by remitting to his common-law remedies one who has been injured by such conduct. (*Cf.* Karseal Corporation v. Richfield Oil Corporation (9th Cir. 1955) 221 F. 2d 358.)[2]

The breach of a contract may become relevant to the causation issue in an antitrust suit between the contractors, when the breach consists of conduct other than that constituting the antitrust violation and when there is evidence that the nonantitrust wrong, not the antitrust violation, was the legal cause of the injury.[3] That is not our case. The

---

2. To the extent that VTR, Inc. v. Goodyear Tire & Rubber Co. (S.D.N.Y. 1969) 303 F. Supp. 773 purports to state a different principle, we disapprove it.

3. If the damages flowed solely from the contractual breach and that breach was not based on conduct that violated the antitrust laws, the antitrust action will be defeated for want of any causal connection between the claimed wrong and the injury. (*E. g., see* Continental Ore Co. v. Union Carbide & Carbon Corp. (1962) 370 U. S. 690, 695-702; SCM Corp. v. Radio Corporation of America (2d Cir. 1969) 407 F. 2d 166, 170-171, cert. denied (1969) 395 U. S. 943.) Legal cause exists between the antitrust wrong and the injury if that wrong is a substantial factor in bringing about the injury. It need not be the sole or the "controlling" cause of the injury. (Ford Motor Co. v. Webster's Auto Sales, Inc. (1st Cir. 1966) 361 F. 2d 874; Haverhill Gazette Co. v. Union Leader Corp. (1st Cir. 1964) 333 F. 2d 798, 802 n. 4, cert. denied (1964) 379 U. S. 931; E. V. Prentice Machinery Co. v. Associated Plywood Mills (9th Cir. 1958) 252 F. 2d 473, cert. denied (1958) 356 U. S. 951.)

If the damages flowed in part from the nonantitrust wrong and the antitrust wrong was not a substantial factor in producing

only wrong of which Mulvey complains is Goldwyn's block booking.

We turn to Goldwyn's standing argument. In pertinent part, section 4 of the Clayton Act provides: "Any person who shall be injured in his * * * property *by reason of* anything forbidden in the antitrust laws may sue therefore * * * and shall recover threefold the damages by him sustained. * * *" (Emphasis added.) The italicized language has been judicially construed to embrace not only the legal causation element, but also the standing concept, which in this setting is a close relative of causation. It is a relationship that had not received a blessing by the Supreme Court. (*See* Hoopes v. Union Oil Company of California (9th Cir. 1967) 374 F. 2d 480, 485.) But the Court has not expressly overturned the decisions of the Courts of Appeals restricting the right to maintain a section 4 Clayton Act suit to those persons who are "within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." (Conference of Studio Unions v. Loew's, Inc. (9th Cir. 1951) 193 F. 2d 51, 54-55, cert. denied (1952) 342 U. S. 919; *accord,* Hoopes v. Union Oil Company of California, *supra;* Twentieth Century Fox Film Corp. v. Goldwyn (9th Cir. 1964) 328 F. 2d 190, cert. denied (1964) 379 U. S. 880; Karseal Corp. v. Richfield Oil Corp., *supra.*) It is unnecessary for us here to decide how much the restrictive decisions may

---

that part, damages for the antitrust wrong will be accordingly diminished.

It would be a rare case indeed in which such questions could be resolved as a matter of law. (*See* Perkins v. Standard Oil Co. of California (1969) 395 U. S. 642, 648-649; Continental Ore Co. v. Union Carbide & Carbon, *supra,* 370 U. S. at 700-701; Radovich v. National Football League (1957) 352 U. S. 445, 453-454.)

have been eroded by the Supreme Court, because Mulvey's claim meets even the restrictive tests. The district court concluded that Mulvey was neither a supplier of motion pictures to television nor a customer in the market for such pictures and therefore was not within the area of the economy endangered by a breakdown of competitive conditions; Goldwyn's acts of licensing were aimed at television stations.

But Mulvey was "hit" as squarely as were *Karseal* and *Hoopes*: He was neither sideswiped nor struck by a carom shot. He was within the area "which it could reasonably be foreseen would be affected" by block booking. (Twentieth Century Fox Film Corp. v. Goldwyn, *supra,* 328 F. 2d at 220).

Block booking enables a distributor to obtain greater revenue from less desirable films by forcing an exhibitor who desires other films to take the entire package. An exhibitor who refuses to accept the less desirable films will be denied the films of greater worth. Block booking thereby enhances the market value of those films of lesser intrinsic merit. If exhibitors refuse to accept the entire package, the revenue normally generated by the more desirable films will be substantially reduced.

Goldwyn directed his activities at the means of distributing films in order to affect their individual revenue-producing potentials—the target area. Mulvey's films are within this target area. Consequently, it is entirely foreseeable that Goldwyn's block booking could impair the profit potential of Mulvey's films, thus depreciating the value of Mulvey's contractual interest in the films' revenue.

No discussion of the collateral points is necessary in view of our disposition of the central issues.

The judgment is reversed.

Order Denying Rehearing

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

December 1, 1970

No. 24157

JAMES A. MULVEY,

Appellant,

v.

SAMUEL GOLDWYN PRODUCTIONS, ET AL.,

Appellees.

ORDER

Before: BARNES AND HUFSTEDLER, Circuit Judges, and PECKHAM,* District Judge

The opinion is modified by the addition of a footnote numbered[4] on page 6, second paragraph, last word in line 16, as follows ["revenue.[4]"]:

> "[4]We disagree with the contrary conclusion on the standing issue reached by the Second Circuit, per curiam, in Fields Productions, Inc. v. United Artists Corp. (Sept. 8, 1970) F. 2d ."

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

*Hon. Robert F. Peckham, United States District Judge for the Northern District of California, sitting by designation.

Order Denying Rehearing

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

SHIRLEY HUFSTEDLER
Shirley Hufstedler,
Circuit Judge

Subject Index

	Page
Argument	1
I. The decision of the court below follows controlling principles of federal law and sound antitrust policy consistent with the clear intent of Congress; therefore, petition for writ of certiorari should be denied	1
A. The decision of the Ninth Circuit Court of Appeals below is in accord with prior rulings and statements by this court	3
B. The petition should not be granted because of any alleged conflict with decisions in other circuits	6
II. The Ninth Circuit's decision below correctly recognized that respondent Mulvey was in the "target area" of the antitrust violation, that Mulvey was directly injured and that the injury was proximately caused by the violation	7
Conclusion	16

Table of Authorities Cited

Cases	Pages
Advance Business Systems v. SCM Corp., 287 F.Supp. 143 (D. Md. 1968)	11
Albrecht v. Herald Company, 390 U.S. 145 (1968)	16
Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2nd Cir. 1970), petition for cert. denied (Oct. Term, 1970, No. 989)	6, 11
Bruces Juices v. American Can Co., 330 U.S. 743 (1947)	2
Congress Bldg. Corp. v. Loew's, Inc., 246 F.2d 587 (7th Cir. 1957)	11
Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 670 (1962)	4
Fields Productions, Inc. v. United Artists Corp., 432 F.2d 1010 (2nd Cir. 1970), petition for cert. denied (Oct. Term, 1970, No. 1062)	6, 7
Hoopes v. Union Oil Co., 374 F.2d 480 (9th Cir. 1967)	11, 12, 13
Lawlor v. National Screen Service Corp., 349 U.S. 322 (1955)	2, 16
Mandeville Island Farms, Inc. v. American Crystal Sugar, 334 U.S. 219 (1948)	4
Perma-Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968)	2, 16
Radiant Burners v. Peoples Gas & Light Co., 364 U.S. 656 (1961)	4
Radovich v. National Football League, 352 U.S. 445 (1957)	5
SCM Corp. v. R.C.A., 407 F.2d 166 (2nd Cir. 1969), cert. denied, 395 U.S. 943	6, 10
Simpson v. Union Oil Co., 377 U.S. 13 (1964)	10
Snow Crest Beverages v. Recipe Foods, 147 F.Supp. 907 (D. Mass. 1956)	6
South Carolina Council of Milk Producers v. Newton, 360 F.2d 414 (4th Cir. 1966)	14

Pages

State of Hawaii v. Standard Oil Co. of California, 431 F.2d 1282 (9th Cir. 1970), petition for cert. granted (March 1, 1971) (Oct. Term, 1970, No. 1060) 6

Steiner v. Twentieth Century-Fox Film Corp., 232 F.2d 190 (9th Cir. 1956) 11

Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190 (9th Cir. 1964) 13

United States v. Loew's, Inc., 371 U.S. 38 (1962) 9

United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948) 9

V.T.R., Inc. v. Goodyear Tire & Rubber Co., 303 F.Supp. 773 (S.D.N.Y. 1969) 6

Waldron v. British Petroleum Co., 231 F.Supp. 72 (S.D. N.Y. 1964) 11, 13

Statutes

Clayton Act, Section 4 (15 U.S.C. §15) 2, 4, 6, 12

Texts

Standing to Sue for Treble Damages Under Section 4 of the Clayton Act, 64 Columbia L. Rev. 570 (1964) 4

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 1376

SAMUEL GOLDWYN PRODUCTIONS, a Limited Partnership, and SAMUEL GOLDWYN,
Petitioners,

vs.

JAMES A. MULVEY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

I. THE DECISION OF THE COURT BELOW FOLLOWS CONTROLLING PRINCIPLES OF FEDERAL LAW AND SOUND ANTITRUST POLICY CONSISTENT WITH THE CLEAR INTENT OF CONGRESS; THEREFORE, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

In arguing for the issuance of a writ of certiorari, petitioners seek to cover all the available bases: they first urge the existence of a conflict between decisions of the Second and Ninth Circuit Courts of Appeals and addi-

tionally argue that the ruling of the Court below in our present case concerns an issue which ". . . has not been, but should be, settled by this Court." (Petition, p. 10.)

Petitioners fail to see that the rule for which they contend has been consistently rejected by this Court. If there does exist a conflict between the Second and Ninth Circuits as to the standing requirements of private antitrust plaintiffs under Section 4 of the Clayton Act (15 U.S.C. §15), this conflict arises because in certain of its decisions, the Second Circuit Court of Appeals has created formalistic and artificial standing requirements which unjustifiably foreclose the private antitrust remedy as to prospective plaintiffs who are injured by reason of antitrust violations. By adding these judicially created standing limitations to the statutory language, some courts have managed to emasculate the vitality of the treble-damage action as an important component of the public interest in vigilant enforcement of the antitrust laws. This Court has regularly rejected restrictions on the civil remedy. *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955); *Bruces Juices v. American Can Co.*, 330 U.S. 743 (1947).

The instant decision by the Ninth Circuit clearly follows the consistently articulated mandate of this Court by recognizing that an individual such as respondent James A. Mulvey herein who suffers business or proprietary injury as a result of an antitrust violation should be encouraged to utilize the treble-damage action as a means of enforcing the national policy fostering free competition and thereby deter future antitrust violators from pursuing

anticipated wrongful conduct. (Petition, Appendix, p. 13a.)

In our present case the respondent Mulvey sold his interest in five motion pictures to the petitioners for $1,900,000.00. Under the terms of the contract the price to be paid to Mulvey would be reduced to the amount already paid (down payment plus a fixed percentage of the *net receipts from distribution* over a stated period of time). As the Court of Appeals below observed (433 F.2d at 1075; Petition, Appendix, p. 12a):

> "Mulvey contends that Goldwyn's block booking was a cause of his receiving only $740,800.95 on his contracts, instead of a price more nearly approximating the $1,900,000 contractual maximum".

In this light, the issue here presented may be seen more clearly. Had petitioner Goldwyn distributed Mulvey's films as individual products, rather than illegally block-booking them, the net receipts derived from the distribution of the five films here involved would have been far greater. Thus, petitioner's antitrust violation (the block-booking method of distribution) directly caused the diminution in value of Mulvey's property right or contractual interest in those films and the reduction in the net receipts from their commercial distribution.

A. The Decision of the Ninth Circuit Court of Appeals Below is in Accord with Prior Rulings and Statements By This Court.

This Court has, on numerous occasions, endorsed and promoted the Congressional policy encouraging the availability of the private treble-damage action. Petitioners contend that this Court has never decided the precise

standing issue here involved. But it is clear that this Court has frequently criticized artificial and formalistic rules which would restrict the application of the private antitrust remedy. The Court has never accepted or adopted the "target area", "area of the economy" or "indirect injury" limitations on the standing of antitrust plaintiffs. Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act,* 64 Colum. L. Rev. 570 (1964). Rather this Court has specifically ruled that "to state a claim upon which relief can be granted under that section, allegations adequate to show a violation and . . . that Plaintiff was damaged thereby are all the law requires." *Radiant Burners v. Peoples Gas & Light Co.,* 364 U.S. 656, 660 (1961). See also *Continental Ore Co. v. Union Carbide and Carbon Corp.,* 370 U.S. 670 (1962).

The issues under Section 4, then, are: (1) did Goldwyn's block-booking practice violate the antitrust laws? If so, (2) did Mulvey suffer injury to his business or property as a result of that illegal and anticompetitive method of distribution?

Any other limitations on an antitrust plaintiff's standing represent nothing more than "judicial glosses" engrafted upon Section 4 by courts which are suspicious of and antagonistic toward the antitrust laws. This Court has expressly renounced such a restrictive approach. As early as 1948 the Court stated in *Mandeville Island Farms, Inc. v. American Crystal Sugar,* 334 U.S. 219, 236 (1948):

> "The statute does not confine its protection to consumers, or to purchasers, or to competitors or to sellers. Nor, does it immunize the outlawed acts be-

> cause they are done by any of these. Cf. United States v. Socony-Vacuum Oil Co., 310 U.S. 150; American Tobacco Co. v. United States, 328 U.S. 781. The Act is comprehensive in its terms and coverage, *protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.*" (Emphasis added.)

In *Radovich v. National Football League,* 352 U.S. 445, 453-454 (1957), the Court appeared to be specifically chastising those lower courts which had restrictively limited the standing of treble damage plaintiffs:

> "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade', Times-Picayune Publishing Co. v. United States, 1953, 345 U.S. 594, 614, and meet the requirement that petitioner has thereby suffered injury. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. . . . In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."

The Ninth Circuit, in its *Mulvey* decision below, has been one of the few courts which has attempted to follow this Court's mandate favoring liberal standing for antitrust plaintiffs. Therefore, the petition for writ of certiorari should not issue in the present case.

B. The Petition Should Not be Granted Because of Any Alleged Conflict with Decisions in Other Circuits.

Respondent does not deny that decisions by Courts of Appeal and District Courts in other circuits reflect a "harder line" concerning the standing requirements under Section 4 of the Clayton Act. *Fields Productions, Inc. v. United Artists Corp.*, 432 F.2d 1010 (2nd Cir. 1970). *Petition for Cert. denied* (Oct. Term, 1970 No. 1062); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183 (2nd Cir. 1970). *Petition for Cert. denied* (Oct. Term, 1970 No. 989); *SCM Corp. v. R.C.A.*, 407 F.2d 166 (2nd Cir. 1969) *Cert. denied.* 395 U.S. 943; *State of Hawaii v. Standard Oil Co. of California,* 431 F.2d 1282 (9th Cir. 1970) *Petition for Cert. granted* (Mar. 1, 1971) (Oct. Term, 1970 No. 1060); *V.T.R., Inc. v. Goodyear Tire & Rubber Co.*, 303 F.Supp. 773 (S.D.N.Y. 1969). Such decisions demonstrate an unwillingness on the part of some courts to enforce the clear policy and spirit of the federal antitrust laws as those laws have been consistently and uniformly construed by this Court. Instead of a device for effective enforcement of national policy, these courts regard the private action as a "windfall" the availability of which should be restricted rather than encouraged. *Snow Crest Beverages v. Recipe Foods,* 147 F.Supp. 907 (D. Mass. 1956).

These restrictive decisions, not the instant ruling of the Ninth Circuit, are the cases which should be reviewed and reversed.

Petitioners' primary argument for certiorari is based on the alleged conflict between the Ninth Circuit's *Mulvey* decision and the Second Circuit's *Fields* decision. In fact, although the two cases represent different philosophies

concerning the availability of the private treble-damage remedy, the two cases are not in direct conflict. Both *Mulvey* and *Fields* concerned plaintiffs seeking damages against motion picture distributors charged with illegal block-booking. In *Mulvey,* the plaintiff asserted that under the terms of his contract with the defendants, the block-booking method of distribution directly caused a diminution in the amount of receipts payable to plaintiff as compared to the amount plaintiff would have received had his films been distributed individually. In *Fields,* on the other hand, the plaintiff was really complaining ". . . that it was not allocated a fair share of the total receipts from the block." 318 F.Supp. at p. 88.

Thus, notwithstanding the superficial similarity of the two cases, the decisions are not directly conflicting. The petition for writ of certiorari should be denied.

II. THE NINTH CIRCUIT'S DECISION BELOW CORRECTLY RECOGNIZED THAT RESPONDENT MULVEY WAS IN THE "TARGET AREA" OF THE ANTITRUST VIOLATION, THAT MULVEY WAS DIRECTLY INJURED AND THAT THE INJURY WAS PROXIMATELY CAUSED BY THE VIOLATION.

Much of the petitioners' argument revolves around the question of whether the plaintiff-respondent Mulvey's property interest was within the area of the economy endangered by Goldwyn's antitrust violation and hence whether the injury to Mulvey was directly and proximately caused by that illegal block-booking. Although the Ninth Circuit, in its opinion below, critically discussed this "target area" concept, the Court did in fact apply the target area principles. As Judge Hufstedler stated

for the unanimous court below (Petition, Appendix, pp. 14a-15a):

> "It is unnecessary for us here to decide how much the restrictive decisions have been eroded by the Supreme Court, because Mulvey's claim meets even the restrictive tests.
>
> . . .
>
> But Mulvey was 'hit' as squarely as were *Karseal* and *Hoopes*: He was neither sideswiped nor struck by a carom shot. He was within the area 'which it could reasonably be foreseen would be affected' by block booking. *(Twentieth Century Fox Film Corp. v. Goldwyn, supra,* 328 F.2d at 220)."

Petitioners would have this Court rule that Mulvey's injury may not be redressed under the antitrust laws because Goldwyn was not "aiming at" Mulvey when he violated the Sherman Act. Petitioners argue that in the illegally block-booking of the involved films, only exhibitors and competing distributors were within the "target area" and therefore only they were "directly injured" by reason of Goldwyn's illegality. Such a view is patently incorrect. Judge Hufstedler adequately answered this contention in her opinion for a unanimous court below by stating:

> "Block booking enables a distributor to obtain greater revenue from less desirable films by forcing an exhibitor who desires other films to take the entire package. An exhibitor who refuses to accept the less desirable films will be denied the films of greater worth. Block booking thereby enhances the market value of those films of lesser intrinsic merit. If exhibitors refuse to accept the entire package, the revenue normally generated by the more desirable films will be substantially reduced.

> Goldwyn directed his activities at the means of distributing films in order to affect their individual revenue-producing potentials—the target area. Mulveys films are within this target area. Consequently, it is entirely foreseeable that Goldwyn's block booking could impair the profit potential of Mulvey's films, thus depreciating the value of Mulvey's contractual interest in the films' revenue." (Petition, Appendix, p. 15a)

In this respect, it should be noted that one of the evils involved in the block-booking of motion pictures is that such results in the depreciation of the artistic value of an individual film. Block-booking also diminishes the value of the more desirable artistic products in the "package". To that extent anyone with an interest in a highly artistic, valuable or desirable product suffers as a result of the illegal distribution. As this Court has previously stated:

> "Where a high quality film greatly desired is licensed only if an inferior one is taken, the latter borrows quality from the former and strengthens its [copyright] monopoly by drawing on the other. The practice tends to equalize rather than differentiate the reward for the individual copyrights." *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948); *United States v. Loew's, Inc.*, 371 U.S. 38, 46-47 (1962).

In our present case, respondent Mulvey suffered immediate and direct economic injury because the pictures in which he had an interest (particularly the classic "Pride of the Yankees") were highly artistic, popular and valuable. Yet they were block-booked with numerous other films in a package called the "Goldwyn Library"

and distributed on an all or none basis. Thus, the net receipts from distribution as to the more valuable films in which Mulvey was interested were diminished, directly reducing the amount which Mulvey ultimately received. Regardless of the labels attached to the relationship between Goldwyn and Mulvey [see *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964)] the indisputable economic facts demonstrate that respondent Mulvey was directly and proximately injured by reason of petitioner's illegal block-booking of the motion pictures here involved.

In opposing respondent Mulvey's standing, petitioners erroneously attempt to analogize our case to those in which the injury to the plaintiffs was derivative. These latter rulings usually concern landlords or employees of a victim which has been destroyed by an antitrust violation and is thus incapable of paying rent or wages to the plaintiff landlord or employees. In these cases, the plaintiffs have no direct relationship with the antitrust violators, but suffer economic injury merely because of their relationship to the immediate victim of the antitrust violation. In each case the plaintiff suffered injury only in a derivative way and only because of his relationship with, and dependence for financial support upon, the primarily injured victim of the antitrust violation.

This analysis explains the recent case of *SCM Corp. v. Radio Corp. of America*, 407 F.2d 166 (2d Cir. 1969) relied upon by petitioners. There, RCA's antitrust claim alleged that SCM's monopolization injured SCM's competitors, some of whom were licensees or customers of RCA. Thus, perhaps RCA was not "directly" injured as a result of SCM's violation. RCA's injury was derivative; i.e., dependent upon its relationship with

its licensees who were the parties immediately injured by SCM's monopolization. See: *Advance Business Systems v. SCM Corp.*, 287 F.Supp. 143 (D. Md. 1968). See also: *Billy Baxter Inc. v. Coca-Cola Co., supra.* But compare other cases favoring the availability of the private antitrust remedy even in cases of so-called "derivative" injury. *Steiner v. Twentieth Century-Fox Film Corp.*, 232 F.2d 190 (9th Cir. 1956); *Congress Bldg. Corp. v. Loew's, Inc.*, 246 F.2d 587 (7th Cir. 1957).

If there is an interest in restricting the availability of the antitrust remedy (although respondent rejects any such notion), it is to prevent actions by those who have had no direct contact or dealings with the violator. Surely, however, plaintiffs such as Mulvey whose injuries flow directly from his dealings with the defendant cannot be foreclosed. Mulvey was in privity of contract with Goldwyn and his injury was caused by Goldwyn's anti-competitive dealings concerning the five films which were the subject matter of that contract.

Mulvey then cannot be compared to the lessees or employees who have been denied standing. Mulvey's economic loss did not arise derivatively because of some relationship with exhibitors or competing distributors who petitioners now urge were the sole occupants of the "target area". Mulvey may maintain an antitrust action, then, because his economic loss arose directly out of his relationship with Goldwyn. *Waldron v. British Petroleum Co.*, 231 F.Supp. 72 (S.D.N.Y. 1964). As the Ninth Circuit Court of Appeals stated in *Hoopes v. Union Oil Co.*, 374 F.2d 480, 485 (9th Cir. 1967):

> "Appellants' claim was not 'derivative', for they sued for damages sustained by themselves and not

> by their tenants or others. Their injuries were 'direct' for they arose out of appellants' own relationship with Union . . . Appellants' 'injuries were not consequential' or 'secondary', for they did not result from injury to third persons. They were not 'remote' for they were the immediate result of the illegal conduct, without intervening cause."

Petitioners argue that only exhibitors and competing distributors are in the "target area" in a block-booking case. Such is not the case. For any party who *foreseeably* may suffer a direct injury to his business or property because of the block-booking is within the target area. (This would include producers of films and individuals such as Mulvey who have a property or contractual interest in the films.)

The "directness" of respondent Mulvey's injury in the present case is clear. The economic loss to Mulvey flowed directly from the illegal conduct by Goldwyn in restrictively distributing the five films in which Mulvey had an interest. Mulvey's injury was not one that is traceable or derivative from the losses suffered by exhibitors or competing distributors. Mulvey is not landlord or employee or licensee of these so-called "primary victims" of the block-booking.

In our present case, as in *Hoopes,* where a plaintiff suffers a direct economic injury because of a defendant's antitrust violation which arises out of the very dealings and transactions by and between the two parties, an action under Section 4 of the Clayton Act is proper. Such is especially true in a case such as ours where the subject matter of the antitrust conspiracy included the very films in which Mulvey had an interest, and the vio-

lation of the law caused direct economic injury to that specific property. *Waldron v. British Petroleum Co., supra.*

Modernly, a number of enlightened rulings by Courts of Appeal have attempted to reconcile "target area" considerations with the Congressional policy favoring liberal availability of the private antitrust remedy. This has been accomplished to a certain extent by focusing upon the issue of whether the injury to the plaintiff was *foreseeable.*

> "But in using the words 'aimed at' this court did not mean to imply that it must have been a purpose of the conspirators to injure the particular individual claiming damages. Rather it was intended to express the view that the plaintiff must show that whether or not then known to the conspirators, plaintiffs' affected operation was actually in the area which it could reasonably be foreseen would be affected by the conspiracy." *Twentieth Century Fox Film Corp. v. Goldwyn,* 328 F.2d 190, 220 (9 Cir. 1964); *Hoopes v. Union Oil Co., supra.*

In both of the above cases, the Ninth Circuit Court further ruled that the element of "proximate cause" is also satisfied if the economic injury to the plaintiff was foreseeable.

Petitioners have all but ignored the element of foreseeability. The conclusion is obvious: they cannot in good faith deny that a diminution in value of Mulvey's interest in the five films was a clearly foreseeable result of the restrictive block-booking of those films. Since Mulvey's interest in the five films was such as to be foreseeably injured by Goldwyn's block-booking of those very pictures, Mulvey was within a "target area" separate from

and independent of the target area in which the exhibitors were located and the still separate target area occupied by competing distributors. Individuals in each of these target areas were injured *directly* although in different ways. None of these parties derived its injury from the others. Each suffered a direct loss to his business or property and hence each such loss, including Mulvey's, is compensable under the federal antitrust laws. The ruling below, then, is not—as petitioners contend—a departure from the view in other circuits, but rather a far more enlightened and intelligent approach to the problem of defining the "target area". It should be noted that the decision of the Ninth Circuit below is consistent with the ruling of the Fourth Circuit in *South Carolina Council of Milk Producers v. Newton,* 360 F.2d 414 (4th Cir. 1966).

Finally, petitioners make the unusual, indeed astonishing, argument that respondent Mulvey's injury was the result of Goldwyn's breach of contract rather than Goldwyn's violation of the antitrust laws. In the court below, petitioners contended that Goldwyn's breach of contract was an "intervening cause" of Mulvey's injury, hence it, and not the antitrust violation, was the "proximate cause" of the resulting damage. This argument is unsupported by any legal authority whatsoever.

Petitioners thus ask this Court to create a new and unique rule of law as follows: In cases where a wrongdoer violates the antitrust laws and simultaneously breaches contractual duties owed to the victim, that victim's *only* remedy is a breach of contract action. Under such a view, state contractual remedies would supersede and preempt Congressionally created federal anti-

trust remedies. Such a contention is patently absurd. It would permit a supplier, who, because of a horizontal price-fixing conspiracy, raises his price above that stated in a contract, to escape antitrust liability in an action brought by the victim of that conspiracy. The victim would be limited to a suit for breach of contract.

The Court of Appeals below properly answered petitioners' arguments as follows (Petition, Appendix, pp. 12a-13a):

> "The arguments are specious . . . It is immaterial that block booking was or was not a breach of contract. Successful maintenance of an antitrust suit does not depend upon the availability or non-availability of a common-law remedy for that wrong. The antitrust laws are an expression of federal public policy to foster free competition. The treble-damage action was designed to implement that policy by encouraging private suitors to enforce the antitrust laws and thereby to deter potential violators from undertaking the forbidden conduct. That purpose would be frustrated by remitting to his common-law remedies one who has been injured by such conduct. (Cf. Karseal Corporation v. Richfield Oil Corporation (9th Cir. 1955) 221 F.2d 358)".

In our case, petitioners' illegal block-booking of films in which Mulvey had an interest *may have* constituted a breach of contract. However, that activity most certainly *was* a violation of the antitrust laws. As demonstrated above, the block-booking directly and foreseeably injured Mulvey's property. Mulvey then may elect which remedy he wishes to pursue in order to seek redress. When conduct by a wrongdoer is actionable under any one of several legal theories, it is the plaintiff, not the

defendant, who has the power of choosing the most effective and appropriate avenue of redress. Goldwyn's contention that his breach of contract preempts the availability of an antitrust remedy is a poorly disguised attempt to usurp Mulvey's right to elect which of several remedies to pursue. Parties to a contract may assert against each other antitrust claims which arise out of their contractual relationship. *Albrecht v. Herald Company,* 390 U.S. 145 (1968). Thus, the legislative policy in favor of the private treble-damage action will not permit the foreclosure of respondent Mulvey's antitrust claim against petitioners merely because a breach of contract action may also be possible. *Lawlor v. National Screen Service Corp.,* 349 U.S. 322 (1955); *Perma-Life Mufflers v. International Parts Corp., supra.*

CONCLUSION

For the reasons set forth herein, and for the reasons stated by the Court of Appeals below, respondent Mulvey's right to bring an antitrust action under Section 4 of the Clayton Act must be recognized. Therefore, the petition for writ of certiorari should be denied.

Dated, San Francisco, California,
March 5, 1971

Respectfully submitted,

LAW OFFICES OF JOSEPH L. ALIOTO,
MAXWELL M. BLECHER,
PETER J. DONNICI,
By PETER J. DONNICI,
Attorneys for Respondent.